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Supreme Court, U.S.
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No. 00-1674

In The

# Supreme Court of the United States

DOWELANCO; EPCO, INC.; and
ROFAN SERVICES, INC.,

*Petitioners,*

vs.

LIBBY SLEATH, MARY ANN HAYES,
GLENDA TRUESDELL, and MARY OWEN,

*Respondents.*

**On Petition For A Writ Of Certiorari**
**To The Supreme Court Of The State Of Montana**

## RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## SUPPLEMENTAL DISCUSSION OF REASONS FOR DENYING THE WRIT

The respondents submit this supplemental brief pursuant to Supreme Court Rule 15.8 to bring to the Court's attention a new decision that was not available when they filed their brief in opposition to DowElanco's petition for a writ of certiorari. That decision is reported as *Nathan Kimmel, Inc. v. DowElanco*, ___ F.3d ___, 2001 WL 766275 (9th Cir. July 10, 2001), and was handed down eight days before DowElanco's reply brief was filed in this case. Although DowElanco was presumably aware of the decision in *Nathan Kimmel v. DowElanco*, it understandably failed to mention that decision in its reply brief.

The Ninth Circuit's decision in *Nathan Kimmel v. DowElanco* significantly modifies a case relied upon in DowElanco's petition and reply brief, *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995). (Pet. p. 12 n. 6; Reply Br. p. 8, incorporating citations in petition.) The decision in *Nathan Kimmel v. DowElanco* also demonstrates why DowElanco's petition is premature in two senses: the lack of jurisdiction and the need for more percolation in the lower courts before this Court takes up the issue of FIFRA preemption.

In their brief, pp. 19-20, the respondents argued that the question presented in DowElanco's petition is not ready for this Court's review. They argued that the lower courts should be given more time to consider the issue of FIFRA preemption in light of *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), and in light of the government's views, as articulated in the EPA brief. As an example, the respondents cited the district court's decision in *Nathan Kimmel*

*v. DowElanco*, 64 F.Supp.2d 939 (C.D. Cal. 1999). The district court felt constrained by Ninth Circuit precedent to find the plaintiff's claims preempted, but it urged an appeal and listed reasons why the Court of Appeals should reconsider its position on preemption. *Nathan Kimmel v. DowElanco*, 64 F.Supp.2d at 944.

The Ninth Circuit's recent decision reversed the district court's decision in part, holding that the plaintiff's common law claim is not preempted. The court's decision to depart from its prior holding in *Taylor* rested heavily on this Court's decision in *Medtronic*. *Nathan Kimmel v. DowElanco*, 2001 WL 766275, *6 ("Our conclusion is compelled by the Supreme Court's holding in *Medtronic*."). The court also discussed the government's position on preemption. *Id.* at *5-6. The court indicated that the general question of whether 7 U.S.C. § 136v(b) preempts any common law claims is now an open question in the Ninth Circuit. Although *Taylor* had answered "yes" to that question, *Nathan Kimmel* left it for another day. Although it considered both the EPA's position that § 136v(b) does not preempt any common law claims and DowElanco's position that it does, the court "decline[d] to endorse either position at this time." *Nathan Kimmel v. DowElanco*, 2001 WL 766275, *6. Instead, the court examined the plaintiff's particular claim and concluded that, even assuming that some common law claims might be preempted, the plaintiff's claim in that case was not. Although the dispute in *Nathan Kimmel* is directly related to the labels on an EPA-regulated pesticide, the duty of care the plaintiff seeks to impose is not "in addition to or different from" federal requirements. *Nathan Kimmel v.*

*DowElanco*, 2001 WL 766275, *6 (quoting 7 U.S.C. § 136v(b)). The court therefore held it was not preempted.

The Ninth Circuit's reliance on *Medtronic* to re-visit the question of FIFRA preemption demonstrates the point that this issue is still percolating in the lower courts. In addition, the Ninth Circuit's reasoning offers a new approach to the preemption issue. Rather than confining itself to the need for holding either that "all label-based common law claims are preempted," or that "no label-based common law claims are preempted," the Court of Appeals instead examined the plaintiff's specific allegations and the relationship between those allegations and the federal regulatory scheme. *Nathan Kimmel v. DowElanco*, 2001 WL 766275, *6-8. This development sharply illustrates the need to allow the lower courts time to work with the issue of the scope of FIFRA preemption.

Additionally, the *Nathan Kimmel* decision manifestly reveals the jurisdictional flaw in DowElanco's petition. A decision in DowElanco's favor by this Court would require a remand not just to determine which of the respondents' claims are "based on" the Dursban labels (the remand DowElanco requests) but also to determine whether the plaintiff's allegations and the elements of their causes of action are consistent or inconsistent with federal requirements. As discussed in the respondents' opposition brief, interlocutory review of the Montana Supreme Court's decision at this time will lead inevitably to more litigation. *Nathan Kimmel v. DowElanco* demonstrates an additional reason why further proceedings on DowElanco's preemption defense would be required in the Montana state courts even if DowElanco were to prevail in this Court. Because a decision in DowElanco's

favor would not terminate litigation on the relevant causes of action, this Court lacks jurisdiction to grant the petition. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975) (describing fourth exception to final judgment rule).

## CONCLUSION

The Ninth Circuit's recent decision in *Nathan Kimmel, Inc. v. DowElanco* further illustrates why DowElanco's petition for a writ of certiorari should be denied.

Respectfully submitted,

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